United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL 74-1404

IN THE

United States Court of Appeals

For the Second Circuit

FRANK BERNARDINI,

Appellee,

vs.

REDERI A/B SATURNUS,

Appellant,

and

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE, FRANK BERNARDINI

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TABLE OF CONTENTS

	PAGE
Statement	1
Facts	2
Defendant's Case	4
(a) Defendant's liability defense	4
(b) Defendant's medical defense	7
(1) Dr. Tagliagambe	7
(2) Dr. Lodico	10
POINT I—Questions of fact and credibility of witnesses are in the provence of the jury; their verdict supported by probative evidence must be affirmed	11
POINT II—The report of Dr. Maglioto taken from the papers and records of Dr. Tagliagambe were properly received: sufficient probative evidence by Dr. Graubard was before the jury for its determination as to injury and permanency	14
POINT III—The Court's charge regarding "longshore" regulations was proper	20
CONCLUSION	20

PAGE

Cases Cited

Albanese v. N. V. Nedrl. Amerik Stoomv. Maats, 346 F. 2d 481, rev'd 382 U. S. 268 20

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U. S. 355 13

Dennis v. Denver & Rio Grande Western R.R. Co., 375 U. S. 208 13

Ettelson v. Met. Life Ins. Co., 164 F. 2d 660 18

Humble Oil & Refining Company v. Naquin, 414 F. 2d 912 (5th Cir.) 14

Imperial Oil v. Drlik, 234 F. 2d 4 (6th Cir.) 14

Medina v. Erickson, 226 F. 2d 475, cert. denied, 351 U. S. 912 20

Mitchell v. Trawler Racer, Inc., 362 U. S. 539 12

Provenza v. American Export Lines, Inc., 324 F. 2d 660, cert. denied 376 U. S. 952 20

Rice v. Atlantic Gulf & Pacific Co., 484 F. 2d 1318 .. 14

Scheinman v. Grace Lines, Inc., 267 F. 2d 596 13

Spano v. N. V. Koninklijke Rotterdamsche Lloyd, 472 F. 2d 33 ..... 13, 14

Tennant v. Peoria & Pekin Union R.R. Co., 321 U. S. 29 13

Weibert v. Hanan, 202 N. Y. 328 18

Weyerhauser S.S. Co. v. Nacirema Oper. Co., 355 U. S. 563 ..... 12, 13

White v. Zutell, 263 F. 2d 613 19

PAGE

Statutes Cited

U. S. Constitution:

7th Amend. 12

28 U. S. C.:

Sec. 1732(a) 19

33 U. S. C.:

Sec. 907(b) 15

N. Y. C. P. L. R.:

R. 4515 18

Authority Cited

McCormick on Evidence:

Sec. 59 16

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Statement

Defendant appeals from a judgment dated October 25, 1973 entered in the United States District Court for the Southern District of New York, following a jury trial before the Honorable Robert J. Ward, which judgment resulted in favor of the plaintiff and against the defendant in the sum of $10,000.00 and dismissed defendant's third party complaint against International Terminal Operating Co., Inc. (12).*

* All number references in parenthesis refer to the pages of the joint appendix on appeal.

Facts

Following 5 days of trial, the jury, in answer to written interrogatories resolved this classic case of credibility in favor of the plaintiff. On October 28, 1969, plaintiff-longshoreman, was sent from the hiring hall to work aboard defendant's vessel. He arrived at the dock, reported to the timekeeper for International Terminal Operating Co., Inc. (hereinafter ITO), was told to report down in the hold of #4 hatch and thereupon boarded the vessel at about 8:45 A.M.

The 5 minute interval between then and 8:50 A.M., when the accident occurred, was the first and last time he had been aboard or had seen the vessel in question. He testified that he had come aboard on the inshore side, walked aft to the forward part of #4 hatch, looked in for the hatch ladder, but when not readily seeing one, walked across the ship to the off-shore side where he sought directions from another longshoreman who was pulling on wires as he re-rigged the boom. He was then directed to the after-end inshore side so he continued walking aft, around the hatch and now once again on the inshore side started forward. As he did so his attention was diverted upward by the sound of the "cracking" noise made by the wires and ropes of the rigging, and so, monentarily pausing, looked up and around to make sure nothing untoward was happening. Assuring himself that all was well and secure with the boom he continued forward but too late and without warning came upon spots of light colored oil or grease on the grey dirty deck. He attempted to dodge or tip toe through the spots but unavoidably slipped, lost his balance and then tripped over a walkway of pallets stacked 2 high which obstructed the deck from hatch coaming to deck rail. (Defendant's witness admitted that the pallets were not in use for cargo

operations.) He further testified that normal procedure based on his 25 years on the waterfront, is to have a small step next to the coaming if needbe to look down the hatch; that normal procedure is to leave a passageway and that custom and practice is to have at least a 3 foot walking area around the hatch free from obstruction or loose gear not being used (79-91, 276-279).

Upon tripping over the pallets he fell in a twisting motion and struck his right shoulder upon the coaming flange that protruded about 4 inches from the top of the coaming out into the deck area, the coaming itself some 3 to 4 feet high, and landed on his back (126). That a subsequent examination of the deck revealed heel prints and scuff marks through the various spots of oil or grease (95, 218).

He sustained bruises and bloody contusions of the shoulder with immediate swelling and resultant sprain. He reported his accident to the timekeeper when he was only asked "what happened?" ("I tripped over the pallets") and not how or why it occurred (i.e., slipped on oil and then tripped over the pallets laying across the deck) (237, 274). The timekeeper then directed him to report to Dr. Tagliagambe, the "company doctor", for treatment. After 3 visits he was told by Dr. Tagliagambe to go back to work. Due to continued pain, swelling and limitation of motion, he consulted his lawyer who referred him to the United States Department of Labor. He was then seen in consultation by the Labor Department's independent consultant, Henry Maglioto, M.D., who made objective findings of injury, found him still disabled from the arduous labor of a longshoreman and recommended additional treatment. In this period he was also sent by his attorneys to Dr. Graubard for examination whose findings and recommendations substantially conformed with those of Dr. Maglioto. He thereupon returned to

the care of Dr. Tagliagambe pursuant to the instructions and recommendations of Dr. Maglioto for approximately 6 more weeks (91-99).

He claimed a loss of earnings of between 185-190 dollars per week for the time he was out plus an additional 2 weeks or so of intermittant loss thereafter. He claimed periodic pain and limitation of shoulder function up to the present time, particularly during climatic weather changes or after arduous labor, the symptoms of which he tries to alleviate by self help in the form of heat, pain pills and analgesic balm rubdowns.

In a subsequent medical exam of June 29, 1970, Dr. Graubard expressed his expert medical opinion that his then findings of defect in motions of the shoulder, continued tenderness in the bicipital groove of the shoulder, tenderness over the acromio clavicular joint of the shoulder along with continued and persistent swelling of the shoulder was causally related to the accident of October 28, 1969 and left him with a permanent impairment of the shoulder equivalent to 17% loss of function (136-138, 146-148).

Defendant's Case

Defendant sought to defend the case on two grounds; (a) there was no accident, i.e., it was faked, and (b) the injuries were minimal and left no permanency. These questions of fact and credibility of the witnesses were, it is respectfully submitted, rebuted and refuted on cross-examination and were ultimately and properly left for the jury's consideration and determination.

(a) Defendant's liability defense.

Defendant's "eye-witness", First Officer Stahl, identified photos of the hatch and surrounding area in an effort

to prove that plaintiff did not go directly behind the #4 hatch as he came from the off-shore to the in-shore side due to the presence of folded pontoons in the immediate area. However he did admit that he did see plaintiff when plaintiff first came aboard at 8:45, saw him cross in front of the forward part of #4 hatch as he walked over to the off shore side, saw him talking to the longshoreman rerigging the boom on the off shore side and then 30 seconds to 1 minute later saw him come around the end of the vessel and start forward on the inshore side alongside the #4 hatch. It is submitted that based upon plaintiff's brief exposure to the vessel i.e., 5 minutes, and his testimony at trial some 4 years later, the "impossibility", as claimed by defendant, of plaintiff's route from the off shore side to the in shore side (crossing right behind #4 hatch—instead of in fact crossing in back of a small house structure immediately to the rear of #4 hatch) was *de minimis* and was treated as such by the jury in their overall credibility deliberations.

Mr. Stahl further testified that after the 30 second to 1 minute interval when plaintiff crossed the ship from offshore to inshore and then started forward he was kept continuously in view. He was some 30 feet from him at the time. He saw plaintiff walking forward, stop, look around and then proceed to first gracefully kneel down and then lay down on the pallets that were 2 high and extending across the deck from the ship's rail to the hatch coaming. These pallets had been there since the prior day, with no direction on his part as First Officer, to have them removed, despite the fact that they were not being used for the cargo operations (441-442).

He also testified that as First Officer he was in charge of the vessel's crew on deck during cargo operations; to look out for the safety on board the vessel; that if there

was something aboard to cause an accident and he didn't do anything to take care of it, the "finger" would be pointing at him; that he would be held to blame if there were oil or grease on the deck where it shouldn't be; to see to it that the longshoremen do their job so that no one gets hurt; to put a stop to something going wrong having received ". . . specific orders from the Captain to look out for the safety on board the vessel so no accident could happen" (430-432).

He further testified the vessel carried an official log book to ". . . enter everything that happened on board a vessel", but despite the fact that this "fake accident" was not a normal occurrence, was very abnormal, that the man was playacting, he made no entry in the official ship's log concerning this incident, even though ". . . any incident out of the ordinary is to be put as an official entry in the ship's log." He claimed that because he was so busy he didn't have the time and forgot to make the official entry, nonetheless he found the time to make an abstract that was allegedly transmitted to the ship's agents (Deft. Ex. G, 475, 764). Despite the fact that he knew the difference between "laying down" and "falling down" and the difference between "*no* complaints of pain" and "complaints of pain" his direct testimony was at variance with his abstract. On direct he testified that the man gracefully kneeled and lay down on the pallets and had made no complaints of pain. The abstract in part stated ". . . the longshoreman fell upon this walking board, and afterwards he made complaints about great pain in his left (sic) shoulder" (345, 346, 490).

He further admitted after persistent cross examination that the ship's carpenter oiled the steel wheels of the hatch covers; that the vessel is in the water 12 months a year; that a preservative is also put on all moving parts;

that the hatch was opened that morning by the crew using these same wheels; and that despite walking about the area since 7:30 A.M. he saw no grease or oil spots on the deck alongside the hatch where the wheels ran back and forth as the covers were moved open. He further stated that even though the vessel is in the water 12 months a year and makes 5-6 or more ocean voyages a year, the wheels are oiled or greased only 1 to 2 times a year (350, 478, 486, 488).

The capstone to this witnesses' testimony, was that despite the fact that the plaintiff was allegedly attempting to perpetrate a fraud upon the defendant and make believe an accident had occurred, plaintiff allegedly attempted to do this right in front of the defendant's First Officer who was by then no more than 20 feet away, had nothing obstructing the vision of each party to the other, that at 5'10-11" tall and weighing 92 kilos (over 200 lbs.) was in full view of plaintiff, wasn't hiding behind any cargo, was not crouched over and watched the plaintiff gracefully kneel down and then lie down on the pallets claiming he had an accident (427-429).

That when plaintiff told his attorney about this Mate, his attorney told him that to cover his job, "He'll probably say you didn't fall" (253).

The credibility of defendant's version and plaintiff's version was thus directly put to the jury for their determination and evaluation resulting in plaintiff's verdict.

(b) Defendant's medical defense.

(1) Dr. Tagliagambe:

Despite the doctor's protestations to the contrary that he was not the "company doctor" i.e., he comes to court completely unbiased, he did admit that he averages 20 to 25 longshoremen patients a day; treats a good number of

longshoremen from the piers in Brooklyn (where the vessel was tied up); that he makes out at least 3,000 medical reports a year concerning longshoremen; that a form on his letterhead authorizing treatment to injured longshoremen is kept on the pier and filled out by the stevedore to be sent along with the injured longshoreman when they are to be treated by the doctor (384—Pltf.'s Ex. 2); and that the plaintiff, was in fact, sent to him for treatment by ITO (367).

Although he initially stated and reported that the plaintiff had contusions, abrasions and sprain of the shoulder, for which he cleansed the wounds and gave sedation for pain, he later admitted on cross examination that the man had swelling and tenderness but did not include this finding in his report (395).

He stated in direct examination that despite these findings after November 4, the man had no restrictions of motion, no swelling, was not disabled and was able to return to work.

He further testified, after his records were marked and identified (376, 353), that he could not recall the man and had no independent recollection of the matters he was testifying to (353). That these "papers" were reviewed by him before he came to Court to testify (377) and were part of his office records concerning the plaintiff. That following plaintiff's physical examination at the Department of Labor where certain findings and recommendations were made as to further therapy (360) and pursuant to that Labor Department medical report, he took further x-rays and again started to treat the plaintiff with deep radient heat physiotherapy 3 times a week until December 1, 1969 and that the full reasonable value of his medical services totaled $145.55. A copy of the medical report directed to the Department of Labor by

Dr. Maglioto and subsequently introduced into evidence as Plaintiff's Exhibit 1 was part of the office papers brought to Court by Dr. Tagliagambe and identified (353, 376).

He stated that the Department of Labor medical consultant's report by Dr. Maglioto was used for reference as part of his examination, report and treatment of the plaintiff (387). He also utilized the report of Dr. Maglioto in carrying out some of the directions or recommendations contained therein, i.e., taking further X-rays of the acromio clavicular area and extending the heat treatments for a few more weeks "because of the report" (390, 391).

The report of Dr. Maglioto to the Department of Labor covering an examination of the plaintiff dated 11/17/69, corroborated Dr. Graubard's report of examination dated 11/4/69, but directly contradicted Dr. Tagliagambe's report and testimony in these salient features:

Dr. Tagliagambe—"no swelling or tenderness";
Dr. Graubard and Dr. Maglioto—"swelling and tenderness";
Dr. Tagliagambe—"no limitations of motion";
Dr. Graubard and Dr. Maglioto—"last 10-15% elevation of shoulder produces pain";
Dr. Tagliagambe—"no restriction of motion";
Dr. Graubard and Dr. Maglioto—"internal rotation is restricted by 25%; external rotation restricted by about 10%";
Dr. Tagliagambe—"no disability—no further treatments";
Dr. Graubard and Dr. Maglioto—"would benefit from further treatment. He is disabled".

Although Dr. Tagliagambe in direct testimony said the man made "definite improvement" he could not recall

the man and had no independent recollection of the matters he was testifying to (353) yet he admitted on cross examination his records no where contained the word "definite". He also stated on direct examination that the man had "active" restriction of motion (i.e., voluntarily, purposefully tried to hold back), yet upon cross examination he admitted that again no where in his notes was such a notation made (403, 404, 405). He attempted to explain that his statement that the plaintiff was actively restricting his motion, even though not actually mentioned in his notes or report, was in fact contained therein by virtue of the doctor's private system of notes i.e., some sort of secret code, known only to him but never explained (410).

(2) Dr. Lodico:

Admitting he was not an orthopedic specialist (579) Dr. Lodico generally testified to a "negative" physical exam of the plaintiff (dated 8/23/71) with no disabilities or limitations. Although in his report and on direct examination he stated the man had an abrasion of the shoulder, on cross examination he stated that really meant abrasions (565); that despite different medical definitions, abrasions and contusions are identical (566) so he did not need to mention both even though he had read Dr. Tagliagambe's report which reported this separate and distinct diagnosis; that he left out the word "sprain" when relating plaintiff's injury (even though Dr. Tagliagambe made this diagnosis) because *plaintiff's attorneys office did not tell him that plaintiff sustained a sprain* (569, 570, 571). That although his notes did not indicate anywhere that *plaintiff's attorney failed to give him* complete information re: injuries, in his note system, similar to Dr. Tagliagambe, the absence of certain words really means the presence of certain information . . . his own type of code system (569-571).

Dr. Lodico also agreed that plaintiff told him he experienced occasional off and on pain of the right deltoid region (581); that the right deltoid muscle originates at the latter third of the clavicle on the border of the acromium process or at or about the acromio clavicular joint (582); that he has had patients who complain of pain on climatic weather change and arduous work (582) although not admitting it can last as long as plaintiff claims it does; yet he believed plaintiff was very honest and that the man was not faking his injury (583).

POINT I

Questions of fact and credibility of witnesses are in the provence of the jury; their verdict supported by probative evidence must be affirmed.

As presented to the Court and jury in both the opening, summation and post-trial arguments, the crux of this appeal by defendant is the issue of credibility . . . credibility as to the happening of the accident . . . credibility as to the injuries sustained by plaintiff . . . credibility as to their severity.

Defendant attempted to impeach and disprove plaintiff's total claim by the testimony of the First Officer and two medical doctors. What is readily apparent is that the jury rejected the defense of "fake", a defense incidentally quite at variance with the First Officer's initial report i.e., "fell upon this walking board" (apparently for no reason); and rejected the opinion of the "company doctor" and his colleague, who were shown to be one sided and somewhat less than candid.

In order for the First Officer to absolve himself from the blame, to get out from under the "pointing finger"

for failing to discover the grease or oil spots and eliminate them, to seek the removal of the boards when they were not in use, by expressly stating and without equivocation admitting his responsibility and obligation for a safe ship, he attempts to brand the plaintiff as a fake, by having him while no more than 20 feet away and in full view of each other, gracefully kneel down and then lay down on the pallets stacked 2 high across the deck. And then not to even make an official log entry of this most unusual, abnormal and "heinous" act. Nevertheless the Court allowed this dichotomy of stories to go to the jury, in whose province questions of fact are to be submitted, and they, it is respectfully submitted, treated defendant's defense for what it was, and found for the plaintiff on this point.

There can be no valid contention to the contrary that this jury deemed the defendant negligent in failing to live up to the very obligations and duties the First Officer admitted were his i.e., failed to notice and eliminate the slippery condition and failed to order the removal of the pallets which were not in use and if we believe defendant's contentions and arguments that the coaming was only 3 feet high, then had no business being there in the first place.

The non-delegable duty of the defendant to furnish plaintiff with a safe place to walk and work, as enunciated in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, is directly applicable to the case at bar. Those duties and obligations owed to the plaintiff were factual issues for the determination of the jury, *Weyerhauser S.S. Co.* v. *Nacirema Oper. Co.*, 355 U. S. 563, and these self same jury factual determinations are not to be ". . . re-examined in any Court of the United States, . . ." *U. S. Constitution, 7th Amend.*

The Appellate Court is not to substitute its judgment on a credibility or factual controversy, where the evidence may be susceptible to different conclusions by reasonable men, *Dennis* v. *Denver & Rio Grande Western R.R. Co.*, 375 U. S. 208, *Scheinman* v. *Grace Lines, Inc.*, 267 F. 2d 596. Similarly in the case of *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U. S. 355, the Supreme Court directed the Court of Appeals not to re-determine facts found by the jury and further that when answers to interrogatories may be consistent with those facts, then they must be left untouched by the appellate body. Accordingly, this jurys' findings, in response to specific interrogatories, that the defendant breached his duties and obligations and was negligent must not be disturbed despite a separate finding of seaworthiness.

Nowhere does our judicial system set down a mandate for mathematical precision in jurors verdicts. In *Tennant* v. *Peoria & Pekin Union R.R. Co.*, 321 U. S. 29, it was held that the function of the Court is not to search the record for conflicting evidence and thereby take the case from jury determinations, rather "(T)he focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury" (at p. 35).

The Supreme Court has never held for the proposition that a verdict against a shipowner for reasons of negligence be coupled and only coupled with a finding of unseaworthiness. In point of fact, the decision in *Weyerhauser Steamship Company* v. *Nacirema Steamship Company, Inc.*, 355 U. S. 563, was based on the same determination, i.e., negligence but no unseaworthiness.

Although defendant cites this Court's decision in *Spano* v. *N. V. Koninklijke Rotterdamsche Lloyd*, 472 F. 2d 33, there the jury found neither negligence nor unseaworthiness the Court did not pass on the specific question but in

its dictum stated it was hard to imagine negligence without unseaworthiness on those specific facts (did a taut lashing wire in a working area make the vessel unseaworthy). In the case at bar there was sufficient evidence for the jury to arrive at either determination. From the probative evidence and the charge by the Court there is no need to strain to reconcile what defendant refers to as an inconsistent verdict. In *Rice* v. *Atlantic Gulf & Pacific Co.*, 484 F. 2d 1318, the jury found negligence without any finding with respect to unseaworthiness. The Court stated it might be justified in inferring unseaworthiness in apposition to its holding in *Spano, supra.* Nonetheless, these cases talk about conditions which are expected to be found in the area in question unlike the case at bar. Although not controlling, but certainly persuasive are the affirmances of jury verdicts on like questions as in *Humble Oil & Refining Company* v. *Naquin,* 414 F. 2d 912 (5th Cir.) and *Imperial Oil* v. *Drlik,* 234 F. 2d 4 (6th Cir.).

POINT II

The report of Dr. Maglioto taken from the papers and records of Dr. Tagliagambe were properly received: sufficient probative evidence by Dr. Graubard was before the jury for its determination as to injury and permanency.

Plaintiff had testified that he was out of work some 12 weeks with intermittent days thereafter. He further testified to pain and limitation of motion to date. The reasonable cost of his medical services was $145.55 and lost earnings totaled between $185-190 per week. Dr. Graubard estimated a 17% loss of function of the extremity. Both Dr. Graubard and Dr. Lodico acknowledged the medical phenomenon of pain on climatic weather change.

Accordingly on this testimony alone, the jury was well within its province of awarding $10,000.00 to the plaintiff. Hardly an amount to be deemed excessive or shocking to the conscience of the Court or community at large. Thus it ill behooves the defendant to argue "but for" the introduction of Dr. Maglioto's report, the jury could not have arrived at the result it did.

Counsel may not search the jury's collective mind and state that this factor was one ". . . upon which they must have given great weight . . ." and one which ". . . may have resulted in the (jurys) adverse finding of liability".

In substance, the testimony of plaintiff, was to the effect that shortly following his injury and abbreviated treatment by the company doctor, Dr. Tagliagambe (hereinafter referred to as Dr. Tag), he was told by Dr. Tag there was nothing wrong with him and he should go back to work.

It is submitted that plaintiff proved that Dr. Tag was indeed the company doctor to whom plaintiff was *sent* by the timekeeper with a "slip" imprinted with the doctor's name which was kept by the timekeeper and given to plaintiff to authorize treatment for him by Dr. Tag. Certainly the jury could logically infer that Dr. Tag was the company doctor—despite the doctor's protestations to the contrary.

Plaintiff testified that he was still "hurting, etc." and accordingly consulted his attorney who thereupon sent him to the Department of Labor.

It should be noted at this time that 33 U. S. C. Sec. 907(b) states in part:

> "Whenever in the opinion of the deputy commissioner a physician has not impartially estimated

> the degree of permanent disability or the extent of temporary disability of any injured employee, the deputy commissioner shall have the power to cause such employee to be examined by a physician selected by the deputy commissioner and to obtain from such physician a report containing his estimate of such disabilities."

Clearly that is exactly what happened here. Plaintiff complained he was still injured, still disabled and unable to return to work—contrary to Dr. Tag's initial opinion. He was sent to be examined by the independent consultant (Dr. Maglioto) who then rendered a report to the commissioner that not only were there objective findings of the injury but that plaintiff was in need of additional treatment and still disabled.

Accordingly, plaintiff went back to Dr. Tag for more treatment which in fact he received—and which he received, as Dr. Tag admitted, pursuant to the report, findings and recommendation of the consultant, Dr. Maglioto.

There is nothing in the regulations that proscribes the admissibility of medical reports sought by the Commission pursuant to *its own authority to seek same.*

McCormick on Evidence, Sec. 59, states that an item of evidence may be logically relevant in several aspects, as leading to distinct inferences or as bearing upon different issues. For one of the purposes it may be competent, but for another incompetent. In this frequently arising situation, ". . . the normal practice is to admit the evidence. The interest of the adversary is to be protected, not by an objection to its admission, but by a request at the time of the offer for an instruction that the jury is to consider the evidence only for its allowable purpose."

In the case at bar, counsel for defendant made no specific requests to charge; i.e., the exhibit—made no request to limit the exhibit for one purpose and not another—and other than an initial objection and arguments that the exhibit be kept out in toto—made no request nor exception to the Courts' charge regarding this exhibit.

Certainly the use of the exhibit was to attack the credibility of the "company doctor" concerning his opinion—his treatment—his finding of "nothing wrong" and his direction to plaintiff to "return to work".

When Dr. Tag admitted that he "relied" upon the consultant's report in following a course of further treatment and that he came to a different conclusion than the consultant but that later he followed the consultant's recommendations and that he relied on the report in furthering his treatment of the patient—then this document could be admitted for the purpose of showing inconsistencies between his statement that there was nothing wrong with the man and that he needed no further treatment and his subsequent course of conduct in giving additional treatments and reports.

Furthermore, any time an expert comes to court to testify, it is proper to inquire on cross examination as to what he bases his opinion—as to what reports or documents or facts he relied on to reach that conclusion. To say that Dr. Tag was not brought to court as an expert witness is to belie the questions put to him by defendant's counsel, i.e., Dr. in your opinion was this man, etc., etc., etc.

It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness and the jury should be informed as to the facts upon which the expert bases his opinion or conclu-

sions or his actions so that the jury may be in a position to determine if the expert's actions or statements are well founded.

Weibert v. *Hanan,* 202 N. Y. 328.

R. 4515 of the N. Y. C. P. L. R. also states that upon cross examination, the expert may be required to specify the data and other criteria supporting his opinion.

In the case at bar, it was demonstrated and reasonable inference could be raised that there was conflicting facts in existence before the doctor when he embarked upon treatment of the plaintiff as well as his conclusions that "there was nothing wrong with him and he should return to work".

The weight of his testimony then became a question for the jury; his credibility becomes an issue for the jury; and last but certainly not least, the basis upon which he acts is a factor the jury is entitled to know to determine the validity of his testimony.

If this is part of his regular file (which indeed he testified to as part of his file on the patient and which was marked for identification) then under the liberalized Federal Rules of Civil Procedure, 28 U. S. C., the Courts have held that these rules are to be interpreted liberally in favor of the admissibility of evidence if there is any theory justifying its admission, and the trial judge is given broad discretion in making that determination.

In *Ettelson* v. *Met. Life Ins. Co.,* 164 F. 2d 660, a physician was called as a witness and the Court allowed into evidence the doctor's office records which were verified and adopted by the physician. Here too, Dr. Tag testified to defendant's Exhibit A for identification as being his papers, file and records covering the plaintiff's treatment.

He identified the report in his file by Dr. Maglioto as being one from the Department of Labor (of which on its face stated as much).

Upon cross examination, he admitted that he *relied* (emphasis supplied) on the report for a further course of treatment of the plaintiff, that he relied and made use of the report in arriving at his subsequent course of treatment and diagnosis of the plaintiff. So here too, he verified and adopted "a portion" of his file permitting admission into evidence at least for that purpose.

In the case of *White* v. *Zutell*, 263 F. 2d 613 (2nd Cir.), a report by a doctor not present at trial was admitted into evidence despite there being "no opportunity to cross examine". The Court of Appeals affirmed and stated that the ruling (admission into evidence) "was clearly correct." They said that "(t)he making of the report was clearly a part of the specialties 'business', indeed that is what he was commissioned to do."

So too, Dr. Maglioto—a medical specialist called into consultation by the Department of Labor to examine and render a report—and he did clearly what he was commissioned to do.

The Court also states what plaintiff argued *supra* i.e.—the report may be weighed along with all other evidence and its weight be tested by the jury, but it should not be precluded into evidence. 28 U. S. C. Sec. 1732(a).

Again, since there was no specific request by defendant re the treatment of this exhibit nor any specific exception by defendant re the weight to be given to the exhibit, the Courts general charge to the jury re the weight of all evidence and credibility of witnesses and effect of exhibits must stand and cannot now be challenged.

Furthermore, it must be pointed out that merely because a party has no opportunity to cross examine the writer

of a medical exhibit, does not in and of itself, compel exclusion.

Medina v. *Erickson*, 226 F. 2nd 475, cert. denied, 351 U. S. 912.

POINT III

The Court's charge regarding "longshore" regulations was proper.

Plaintiff-appellee submits that until such time as the United States Supreme Court rules *Provenza* v. *American Export Lines, Inc.*, 324 F. 2d 660, cert. denied 376 U. S. 952, is no longer the law, that decision is controlling. Since, the case of *Albanese* v. *N. V. Nedrl. Amerik Stoomv. Maats*, 346 F. 2d 481, rev'd 382 U. S. 268, was reversed by the United States Supreme Court thereby reinstating the District Court's charge, i.e. the regulations are proper in the jury's evaluation of defendant's conduct, then *Provenza* is still the controlling law.

Conclusion

The Court's charge was correct. The admission into evidence of the medical report was proper and the jury's findings are amply supported by probative evidence.

Accordingly the judgment should be affirmed.

Respectfully submitted,

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Frank Bernardini.

JAMES DAVID AUSLANDER,
Of Counsel.

Due and timely service of five (2) copies of
the within Appellee Briefs is hereby admitted this
12 day of Dec., 1974

Haight, Gardner, Poor & Havens
Attorney for Appellant.

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